

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (Remand)

**SOUNDEXCHANGE, INC.’S OPPOSITION TO MUSIC CHOICE’S MOTION TO
COMPEL THE PRODUCTION OF DOCUMENTS**

SoundExchange, Inc. respectfully submits this opposition to Music Choice’s Motion to Compel, pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand (dated Dec. 1, 2020); 17 U.S.C. § 803(a)(1); 37 C.F.R §§ 303.6(f), 351.15, & 351.5(b)(1). Music Choice’s motion is not only untimely, but groundless. Even if the Court were to excuse Music Choice’s delay in filing (which it should not do), the documents Music Choice seeks are unquestionably privileged. SoundExchange has already produced to Music Choice all non-privileged documents reflecting the investigation and analysis conducted by the accountants at Prager Metis with respect to Music Choice’s defensive audits. Music Choice’s claim that SoundExchange must now produce *privileged* documents prepared at the direction of counsel in anticipation of this litigation – and that the Court should allow Music Choice to compel such production over a month after the close of document discovery – should be rejected.

I. Background

The deadline for production of documents, serving interrogatory responses, and identifying declarants in this remand proceeding was March 31, 2021. Order Approving Joint Proposed

Schedule for Proceedings on Remand, at 2 (Dec. 8, 2020) (“Scheduling Order”). SoundExchange complied with that deadline. *See* Ex. C to Wheeler-Frothingham Decl., at 1.

Although SoundExchange completed its document production nearly a month earlier, Music Choice waited until April 28, 2021 to demand that SoundExchange produce “any documents containing any analyses by Mr. Stark, or anyone else at Prager Metis, of Music Choice’s defensive audits,” which it contend are responsive to its Request for Production (“RFP”) 12.¹ Ex. D to Wheeler-Frothingham Decl., at 1-2. Music Choice had not previously raised this issue or any purported deficiencies in SoundExchange’s document production. Declaration of Andrew B. Cherry (“Cherry Decl.”) at ¶¶ 6, 12-14.

The following day, SoundExchange explained that it had already produced all of the non-privileged documents responsive to RFP 12. Ex. D to Wheeler-Frothingham Decl., at 1; *see also* Ex. B to Wheeler-Frothingham Decl., at 12 (SoundExchange’s discovery responses objecting to production of privileged documents). On April 29, 2021, Music Choice filed the instant motion.

II. Music Choice’s Motion Is Untimely

Music Choice’s Motion was filed nearly a month after the close of document discovery. Music Choice argues that the Judges should excuse its failure to previously raise the issue addressed in its Motion because it was not aware that SoundExchange was going to introduce testimony about Music Choice’s defensive audits, performed by BDO.² This excuse does not hold water. As Music Choice acknowledges, SoundExchange timely disclosed Mr. Stark on March 31,

¹ Request No. 12 sought “All Documents concerning any harm or burden SoundExchange contends it has suffered as a result of any PSS licensee’s use of the Defensive Audit Provision at any time.”

² Music Choice’s suggestion that the April 29 deadline for taking *depositions* somehow enlarged the time for document discovery is facially inconsistent with the Scheduling Order, to which Music Choice agreed. Scheduling Order at 2; *see also* Motion for Scheduling Order (proposed schedule submitted jointly by Music Choice and SoundExchange).

2021 as a declarant who would discuss audits. Motion at 3. Both parties sought documents and information about defensive audits in their requests for production (“RFP”) and interrogatories. Cherry Decl. at ¶ 5 (citing Exhibits A, B, and C to the Declaration of Andrew B. Cherry; Ex. A to the Declaration of Margaret L. Wheeler-Frothingham). Before the close of document discovery, the parties engaged in multiple meet and confers, in which Music Choice had every opportunity to raise the issues in this Motion, but chose not to do so. Cherry Decl. at ¶¶ 6-7. SoundExchange produced responsive, non-privileged documents reflecting Prager Metis’s 2013-2016 audit of Music Choice on behalf of SoundExchange. Cherry Decl. at ¶ 9. That document production included documents discussing Music Choice’s use of the defensive audits conducted by BDO, and Music Choice’s refusal to comply with Prager Metis’s requests for information on this basis. Cherry Decl. at ¶ 10.

Music Choice cannot credibly claim that it was unable to determine the subject of Mr. Stark’s declaration until it reviewed SoundExchange’s request for a subpoena on April 27,³ or that SoundExchange’s identification of audits as the subject of Mr. Stark’s declaration was insufficient to put it on notice that his testimony would relate to defensive audits. After all, the *only* audit-related issue that D.C. Circuit remanded to this tribunal is the issue of defensive audits. *See Order Regarding Proceedings on Remand*, at 1 (December 1, 2020). As the Judges have acknowledged, the scope of this remand proceeding “is limited to the issues of the extent to which Music Choice’s

³ Although Mr. Stark expressed willingness to provide a declaration, SoundExchange requested that the Judges issue a subpoena to Prager Metis to ensure that Prager Metis can comply with the formalities of the non-disclosure agreement that it entered into with BDO. Subpoena Mot. at Ex. B at 1 (“Prager Metis agrees that (a) the information obtained from the review will not be used for any other purpose, (b) it is unable to, and will not, comment orally or in writing to anyone, other than SoundExchange and Music Choice, as a result of that review as to whether our audits were performed in accordance with auditing standards generally accepted in the United States of America except as required by law.”).

Internet transmissions are covered by the PSS license *and the effect of so-called ‘defensive audits.’*” *Id.* (emphasis added).

Music Choice had multiple chances to seek additional discovery on the defensive audits it hired BDO to conduct. Consistent with the agreed Scheduling Order, Music Choice could have but did not:

- Raise this issue in any of the conferences with SoundExchange’s counsel that occurred in the ordinary course of document discovery,
- File a motion to compel before the March 31 deadline or shortly after receiving SoundExchange’s documents,⁴ and/or
- Take Mr. Stark’s deposition.⁵

What Music Choice may not do is wait until time for any of the above has passed, and sandbag SoundExchange in order to prevent it from presenting the Judges with important evidence about one of the two remaining issues in this case.⁶ This tactic is unfair to SoundExchange and in contravention of the Scheduling Order to which both parties agreed. *See* Joint Motion for Proposing Schedule.

⁴ Music Choice makes clear that “the catalyst” for its Motion to Compel was SoundExchange’s April 27, 2021 request for a subpoena. Music Choice does *not* claim that its nearly month-long delay in identifying the purported errors was attributable to its review SoundExchange’s production. Nor could Music Choice plausibly claim that the volume of documents SoundExchange produced (67 in total) should have provided any barrier to timely review. *See* Cherry Decl. at ¶ 8 (SoundExchange produced a total of 67 documents and Music Choice produced a total of 2,830).

⁵ Although the Scheduling Order provides that each party may take up to two depositions, Music Choice declined to notice any. Scheduling Order, at 2; Cherry Decl. at 12.

⁶ Music Choice appears to be adamant about preventing the Judges from learning about the defensive audit conducted by BDO. With the exception of engagement letters and final reports, Music Choice has refused to produce any documents related to the BDO audit; it has stated that it will oppose issuance of a subpoena that would enable Mr. Stark to testify; and, by filing this Motion, it has attempted to create another barrier to Mr. Stark’s testimony, threatening SoundExchange’s ability to keep privileged information confidential if it elicits a declaration from him.

III. SoundExchange Has Produced the Requested Documents and Any Remaining Documents Are Privileged

Untimeliness aside, there simply is no treasure trove of documents—regardless of what Music Choice may wish. As SoundExchange explained to Music Choice before the filing of this Motion, it has already produced all non-privileged documents that are arguably responsive to Music Choice’s RFP No. 12.⁷ Music Choice’s Motion does not change that fact.

Ignoring the above, Music Choice has filed a Motion built on its own incorrect assumptions. First, Music Choice suggests that SoundExchange did not produce documents responsive to its request. Mem. at 2. This is simply not so. Cherry Decl. at ¶ 10 (documents included correspondence among Music Choice, SoundExchange, and Mr. Stark discussing the BDO defensive audits and Mr. Stark’s review of some of the work papers and documents from those audits). Second, Music Choice acknowledges that its Motion is premised on a presumption that additional non-privileged documents exist. Mem. at 2 (“Presumably, Mr. Stark and Prager Metis provided SoundExchange with some written report, communications, or other form of analysis of their findings that led SoundExchange to drop its audit request.”). Again, Music Choice is wrong.⁸

The few additional documents that might arguably contain Mr. Stark’s analyses of the defensive audits conducted by BDO have been withheld as privileged. Cherry Decl. at ¶¶ 7, 11.

⁷ For the avoidance of doubt, and without taking a position as to whether the documents Music Choice now seeks (“investigation and analysis conducted by SoundExchange’s accountants at Prager Metis with respect to Music Choice’s defensive audits conducted by BDO”) are within the scope of its original RFP 12, SoundExchange can confirm that there are no additional non-privileged documents responsive to Music Choice’s request as stated in its Motion to Compel.

⁸ Music Choice mischaracterizes the events leading up to this litigation by repeatedly claiming that SoundExchange “drop[ped] its audit request.” Mem. at 2. Rather, SoundExchange was unable to proceed with its audit of Music Choice because Music Choice refused to cooperate with SoundExchange’s audit.

These documents include communications between Prager Metis and SoundExchange's in-house counsel which were prepared at the request of counsel in anticipation of litigation, as well as in-house counsel's communications about the audits, which were internal to SoundExchange; thus, they fall squarely within the bounds of work product that is protected from disclosure.⁹ *See* Fed. R. Civ. P. 26(b)(3)(A) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."). Music Choice appears not to contest the validity of SoundExchange's designation of these documents as protected by the work product privilege. *See* Mem. at 5 ("Music Choice recognizes that it is possible that, at some point, SoundExchange believed certain of the requested documents to be subject to work product protection or other privilege. Under certain circumstances, such a position could be reasonable."). Instead, Music Choice wrongly argues that SoundExchange has waived the privilege by offering Mr. Stark as a declarant on the issue of Music Choice's defensive audits. Mem. at 5-6.

IV. SoundExchange Has Not Waived and Will Not Waive Privilege

Music Choice is wrong that Mr. Stark's declaration will constitute a waiver of privilege.¹⁰ Contrary to Music Choice's suspicion, SoundExchange has no intention of including information about the privileged documents, their contents, or Mr. Stark's communications with SoundExchange in his declaration. The Judges need not take SoundExchange's word on this point, as SoundExchange's motion identified the topics on which it seeks Mr. Stark's testimony in its proposed subpoena:

⁹ Communications of counsel may also implicate attorney-client privilege.

¹⁰ Because SoundExchange's request to subpoena Mr. Stark is pending, Music Choice's Motion is also premature.

1. Prager Metis CPAs' royalty verification procedures on behalf of SoundExchange, including the effect of Music Choice's use of so-called Defensive Audits on Prager Metis CPAs' ability to conduct such royalty verification procedures.
2. The Defensive Audit conducted by BDO USA, LLP ("BDO") for Music Choice and the effect of any such audit on Prager Metis CPAs' ability to conduct a royalty verification procedure intended to reflect the period from 2013 to 2016.
3. The scope of the royalty verification procedures Prager Metis conducts on behalf of SoundExchange, as compared to the scope of Defensive Audits conducted for Music Choice.

SoundExchange's Motion for Subpoena to Prager Metis CPAs, Exhibit A at 2 (filed Apr. 27, 2021) ("Subpoena Motion"). SoundExchange has not sought testimony about "Prager Metis's actual findings, analyses and opinions expressed to its client SoundExchange in the actual investigation," as Music Choice contends. Mem. at 2 (speculating that this "would be the very subject of Mr. Stark's proposed testimony in this proceeding"); *see also id.* at 5-7. Nor does SoundExchange intend to elicit such testimony from Mr. Stark.

The cases Music Choice cites involve wildly different circumstances than this Motion. In *United States v. Nobles*, a litigant attempted to offer oral testimony about the substance of a document while refusing to disclose that same document. *See* Motion at 6 (citing *Nobles*, 422 U.S. 225, 239-40 (1975); *In re Sealed Case*, 676 F.2d 793, 817 (D.C. Cir. 1982) (*Nobles* stands for the principle that "the work product privilege was waived when its holder made 'testimonial use' of privileged material by adducing testimony *as to some of the contents of a privileged document*" (emphasis added))). *Hager v. Bluefield Regional Medical Center* is likewise inapposite; it involves waiver of work product where a "litigant put[] his attorney's opinions into direct issue by designating his lawyer as an expert witness." Mem. at 6 (citing *Hager*, 170 F.R.D. 70, 78 (D.D.C. 1997)). These cases offer no support for Music Choice's claim. Put simply, Music Choice is

wrong that a declaration about a limited set of non-privileged matters should trigger in a broad subject matter waiver that makes privileged documents fair game.¹¹

Dated: May 10, 2021

Respectfully submitted,

/s/Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)

JENNER & BLOCK LLP

1099 New York Avenue NW, Suite 900

Washington, DC 20001

(202) 639-6000

Counsel for Plaintiff SoundExchange, Inc.

¹¹ Courts disfavor broad subject matter waiver with respect to work product privilege. *See Williams & Connolly LLP v. U.S. S.E.C.*, 729 F. Supp. 2d 202, 211 (D.D.C. 2010), *aff'd sub nom. Williams & Connolly v. S.E.C.*, 662 F.3d 1240 (D.C. Cir. 2011).

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DECLARATION OF ANDREW B. CHERRY

1. I am an attorney at Jenner & Block LLP, and am counsel for SoundExchange, Inc. in the above-captioned remand proceeding. I submit this declaration in support of SoundExchange, Inc.’s Opposition to Music Choice’s Motion to Compel the Production of Documents by SoundExchange. I am fully familiar with the facts set forth in this declaration, and if called upon to testify could do so truthfully and competently.

2. On February 1, 2021, SoundExchange served its Request for Production of Documents. Attached as Exhibit A to this declaration is a true and correct copy of SoundExchange’s Request for Production of Documents.

3. On February 1, 2021, SoundExchange served its First Set of Interrogatories on Music Choice. Attached as Exhibit B to this declaration is a true and correct copy of SoundExchange’s First Set of Interrogatories to Music Choice.

4. On February 1, 2021, Music Choice served its Interrogatories on SoundExchange. Attached as Exhibit C to this declaration is a true and correct copy of Music Choice’s Interrogatories to SoundExchange.

5. Both parties sought documents and information about defensive audits in their requests for production (“RFP”) and interrogatories. Two of SoundExchange’s interrogatories and

seven of SoundExchange's RFPs sought information and documents about defensive audits. Two of Music Choice's interrogatories and two of Music Choice's RFPs sought information and documents about defensive audits. *See* Exhibits A, B, and C; Ex. A to the Declaration of Margaret L. Wheeler-Frothingham.

6. On February 19, 2021, March 11, 2021, and March 19, 2021, I engaged in meet and confer conversations with Music Choice's counsel to discuss the parties' document requests. On these calls and in subsequent emails, other than discussions about confidentiality designations, Music Choice did not raise any issue with SoundExchange's response to RFP 12 or any purported substantive deficiencies in SoundExchange's document production.

7. During the meet and confer calls and in subsequent email correspondence, Music Choice made clear that it would not exchange privilege logs, and did not believe doing so was necessary. Music Choice also made clear that it believed privilege logs were a settled issue because the parties agreed not to exchange privilege logs in the underlying proceeding.

8. On March 31, 2021, SoundExchange produced 67 documents totaling 327 pages, and Music Choice produced 2,830 documents, totaling 15,676 pages.

9. SoundExchange produced responsive, non-privileged documents reflecting Prager Metis's 2013-2016 audit of Music Choice on behalf of SoundExchange, which are found at Bates Numbers SXREMAND000000132-141 and SXREMAND000000145-308.

10. SoundExchange produced documents responsive to RFP No. 12. These included documents discussing Music Choice's use of the defensive audits conducted by BDO, and Music Choice's refusal to comply with Prager Metis's requests for information on this basis. *See* SXREMAND000000167-201, 280-301, 305-306. This production included correspondence

among Music Choice, SoundExchange, and Mr. Stark discussing the BDO defensive audits and Mr. Stark's review of some of the work papers and documents from those audits.

11. The few additional documents that might arguably contain Mr. Stark's analyses of the defensive audits conducted by BDO have been withheld as privileged.

12. On April 14, 2021 and April 20, 2021, I engaged in meet and confer calls with Music Choice's counsel to discuss depositions and deposition logistics. During these meet and confer calls, Music Choice's counsel indicated that Music Choice did not intend to take any depositions. Music Choice never noticed any depositions. On these calls, Music Choice did not raise the issue with SoundExchange's response to RFP 12 or any purported deficiencies in SoundExchange's document production.

13. Prior to the April 28 email, Music Choice's counsel did not raise any purported deficiencies in SoundExchange's production to RFP 12.

14. On April, 29, 2021, after Music Choice sent the April 28 email, but before SoundExchange responded, I engaged in a meet and confer call with Music Choice's counsel to discuss the logistics of an upcoming deposition. When asked by Music Choice's counsel, I confirmed that SoundExchange was in receipt of the April 28 email, and that a response from SoundExchange would be forthcoming.

15. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 10, 2021
Arlington, Virginia

Respectfully submitted,

/s/ 

Andrew B. Cherry (Cal. Bar # 315969)

acherry@jenner.com

JENNER & BLOCK LLP

1099 New York, Avenue NW, Suite 900

Washington, D.C. 20001

Tel.: 202-639-6000

Fax: 202-639-6066

Counsel for Plaintiff SoundExchange, Inc.

EXHIBIT A

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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In the Matter of:

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) (2018-2022) (Remand)
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**SOUNDEXCHANGE, INC.’S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand (dated Dec. 1, 2020), 17 U.S.C. § 803(a)(1) and 37 C.F.R. § 351.15, SoundExchange, Inc. (“SoundExchange”) serves this First Set of Requests for Production of Documents on Music Choice. These Requests are to be interpreted and answered in accordance with the Definitions and Instructions below.

DEFINITIONS AND INSTRUCTIONS

1. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Requests.
2. The singular shall be construed to include the plural and the plural shall be construed to include the singular as required by the context to elicit all information discoverable within the broadest scope of these Requests.
3. “And” and “or” have both conjunctive and disjunctive meanings as required by the context to elicit all information discoverable within the broadest scope of these Requests.
4. “Any” and “all” shall mean “each and every.”

5. The term “documents” shall be construed broadly, and includes every writing, recording, photograph, summary, spreadsheet or record in any form, whether handwritten, printed, typed, taped, electronic or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded and includes electronic documents (such as electronic mail messages and all attachments to mail messages).

6. The term “communication” means the transmittal of information by any means and includes communication of any kind, whether written, oral, electronic, or other.

7. The term “including” is illustrative and not limitative and shall be construed to elicit all information discoverable within the broadest scope of these document requests.

8. The terms “reflecting,” “referring,” “concerning,” “relating to,” “related to” and “showing” includes: addressing, pertaining to, referring to, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter.

9. “Acceptable Procedure Provision” refers to any provision of the Copyright Royalty Judges’ regulations identifying “an acceptable verification procedure” for statutory royalties for PSS, including 37 C.F.R. § 382.7(d) published in the CRJ’s Determination at 83 Fed. Reg. 65,268, the provision previously found at 37 C.F.R. § 382.6(e) (2013), and to the extent it may be relevant, the provision previously found at 37 C.F.R. § 382.7(e) (2013).

10. “Audit” refers to any audit or verification procedure related to Music Choice’s statutory royalty obligations or other obligations under the statutory licenses in Sections 114 and 112(e).

11. “CRJ’s Determination” refers to the Final Determination issued by the Copyright Royalty Judges in this proceeding and published in the Federal Register at 83 Fed. Reg. 65,210 (Dec. 19, 2018).

12. “Defensive Audit” refers to an audit or any similar verification procedure initiated by Music Choice in the ordinary course of business that Music Choice contends did or should serve as an acceptable verification procedure in lieu of a verification of Music Choice’s statutory royalty payments by an auditor selected by SoundExchange pursuant to audit regulations adopted by the Copyright Royalty Judges.

13. “Distributor” means any multi-channel video programming distributor or other entity that has made Music Choice’s digital audio transmissions available to the public.

14. “Engagement” refers to an arrangement or agreement between you and an auditor regarding the nature of the services to be provided by the auditor in connection with an Audit of Music Choice, including an “audit engagement” or an “agreed-upon procedures engagement” as those terms are used by accountants.

15. “Music Choice,” “you,” and “your” refer to Music Choice, its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, and predecessors of its corporate affiliates, parents, subsidiaries, business units and divisions, and their representatives, officers, agents, servants, counsel, employees, consultants, and any person authorized to act, acting, or purporting to act on their behalf.

16. “Person” means, without limitation, any natural person, group of natural persons,

corporation, partnership, company, limited liability company, sole proprietorship, unincorporated association, joint venture, and any other incorporated or unincorporated business, governmental, or public entity.

17. “PSS” refers to a preexisting subscription service or preexisting subscription services, as defined by the Copyright Act, 17 U.S.C. § 114(j)(11).

18. “PSS rate” refers to a royalty rate for PSS under the statutory licenses in Sections 114 and 112(e) of the Copyright Act and its implementing regulations.

19. “SoundExchange” refers to SoundExchange, Inc., and its employees and agents.

20. Please provide separate written responses to all of the following Requests, and repeat each Request and the number of each Request with each response. If you object to any Request, identify the number of the Request to which you object, state the basis for your objection in sufficient detail so as to permit the adjudication of the validity of the objection, and produce any documents responsive to the portion of the Request that you do not find objectionable.

21. Unless otherwise specified, each Request shall be considered a request for the production of the original document or a complete copy thereof, provided they are in your possession, custody, or control or in the possession, custody, or control of your present or former employees, attorneys, representatives, agents, and other Persons under your control or acting on your behalf who are reasonably likely to have documents responsive to the Request.

22. When any Request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

23. If you contend that any document or communication or any portion of any document or communication otherwise responsive to a Request is protected from discovery on

the grounds of privilege or otherwise:

- a) Identify the document or communication;
- b) Identify the Person or Persons making the communication or authoring the document, and all Persons receiving the information contained in the document or communication;
- c) Specify the type of privilege or other reason asserted for withholding the requested document or communication;
- d) Specify the legal and factual basis for the assertion; and
- e) Describe the withheld document or communication to a degree sufficient to enable the court to decide if such claim has been properly invoked.

If a portion of a document contains information subject to a claim of privilege, only that portion shall be redacted, and the remainder shall be produced.

24. If any document responsive to a Request is known to exist or to have existed, but is currently unavailable for any reason, include a statement to that effect indicating when the document was last in your possession, custody, or control; where the document is currently located (and under whose custody or control), and the date and disposition of the document.

25. If you do not have all of the information you need to make a complete response to any Request, state that your information is incomplete, answer the Request to the extent possible, and explain why the remainder cannot be answered. If you have no information at all, state so.

26. If there are no documents responsive to a particular Request, state so.

27. Any document produced for inspection or copying shall be identified by the particular Request to which it responds.

28. Unless otherwise indicated in a particular Request, the Requests below cover the time period from January 1, 1996 through the present.

29. Documents offered in response to these requests must be furnished in as organized and usable form as possible. Media files (e.g. audio/video files), excel files, database files (e.g., .csv), and computer code must be produced in native format, along with TIFF image placeholders indicating that a document has been produced in native format.

30. In accordance with the Copyright Royalty Judges' Schedule of Proceedings (dated Dec. 8, 2020) issued in this proceeding, please produce all written responses and objections for delivery no later than February 17, 2021, and produce all responsive documents for delivery no later than March 31, 2021. Please serve one set of all responses and objections by electronic copy to all Jenner & Block attorneys who have appeared in this matter.

31. These Requests are continuing in nature. You are required to supplement or modify any answer given or production made as additional or different information becomes known to you until the conclusion of this litigation.

DOCUMENT REQUESTS

1. All documents you relied on in preparing your responses to SoundExchange's First Set of Interrogatories.

2. All internal communications among persons affiliated with Music Choice that relate to the subject matter of this remand proceeding, including communications related to your provision of service offerings that were available on July 31, 1998 and communications related to your Defensive Audits.

3. All communications between you and any other person or entity that relate to the subject matter of this remand proceeding, including communications related to your provision of service offerings that were available on July 31, 1998 and communications related to your Defensive Audits.

4. All documents on which you relied to determine that you are entitled to pay statutory royalties at the PSS Rate for your internet transmissions, including for your internet-exclusive channels and for transmissions delivered through smartphone applications.

5. All documents related to the nature of internet service offerings you provided on or before July 31, 1998, including the Distributors the subscribers of which were able to access such offerings.

6. For each service you offered on July 31, 1998 and for each service you have offered at any time that includes internet transmissions, provide the following documents applicable to that service, from the time you began offering that service to the present:

- a. Documents sufficient to show the dates that internet transmissions were made available to subscribers as part of the service, as well as the first date on which any subscriber actually used such internet transmissions;
- b. All advertisements and other marketing materials mentioning the internet features of the service;
- c. All press releases and other public communications announcing or describing the introduction of or modifications to internet features of the service;
- d. Documents sufficient to show the methods by which subscribers could access the service, including internet transmissions, and any changes over time;
- e. Documents sufficient to show all user interfaces through which users could or can access internet transmissions through the service as they have evolved over time, including user interfaces of websites and mobile apps providing access to internet transmissions through the service;
- f. Documents sufficient to describe all back-end systems, networks and other infrastructure used deliver the service to Distributors and subscribers;

- g. Documents sufficient to show security controls on the internet features of the service, including methods of authenticating internet users as subscribers to the service;
 - h. Documents sufficient to show any features of the service specific to access from mobile devices, including available mobile apps and any optimization of web pages for mobile devices;
 - i. Documents sufficient to show any limitations on subscriber access to the internet features of the service from outside the home;
 - j. Documents sufficient to show the extent of subscriber access to and/or use of the internet features of the service from outside the home;
 - k. Documents sufficient to show whether and how the internet features of the service were or are bundled with cable, satellite or other offerings;
 - l. Documents sufficient to show your annual spending on technology development for the internet features of the service;
 - m. Documents sufficient to show all changes to programming guidelines and specifications;
 - n. Documents sufficient to show all changes to brand guidelines; and
 - o. Documents sufficient to show all changes to channel line-ups, including differences in the number of channels or other content available over the internet versus those available over cable or satellite.
7. All communications about any changes to your internet service offerings that were implemented, considered, or are under consideration.
8. Documents sufficient to show the location (*e.g.*, whether inside or outside the subscriber's home) where users of your service offerings receive internet transmissions, as

well as the platform (*e.g.*, computer, mobile phone, television) through which users of your service offerings receive such transmissions, for each month from January 1996 through the present.

9. For each of your service offerings and for each cable or satellite television provider distributing your services, documents sufficient to show, by month, the:
- a. available Music Choice subscription offerings and options;
 - b. number of subscribers to each subscription offering or option;
 - c. number of channels provided by transmission medium (*e.g.*, cable, satellite, internet);
 - d. number of performances (as defined in 37 C.F.R. 380.7);
 - e. number of unique users of internet transmissions; and any other usage data you collect for the internet features of the service, including any breakdown by device type, operating system or browser.

10. For each of your channels available over the internet, documents sufficient to show, by month, the:

- a. number of performances (as defined in 37 C.F.R. 380.7);
- b. number of unique users of internet transmissions; and
- c. any other usage data you collect for the internet features of the service, including any breakdown by device type, operating system or browser.

11. All contracts, agreements, contract amendments, term sheets, similar transactional documents and related communications relating to your provision of service offerings that included internet transmissions on July 31, 1998.

12. All business plans, pro formas, strategy decks and similar documents related to your service offerings that have included internet transmissions.

13. All documents concerning eligibility or lack of eligibility for PSS rates, including all documents and communications concerning whether any of your service offerings or the offerings of some other entity is eligible for the PSS rate.

14. Documents sufficient to show and substantiate Music Choice's allocation of costs and revenues between lines of business and different types of service offerings.

15. All documents relating to all Defensive Audits that you have conducted, including: (a) documents sufficient to identify the auditor(s) you used; (b) all Engagement letters or agreements; (c) instructions given by you to auditors; (d) auditor work papers; (e) draft and/or final reports; (f) documents describing the scope of the audits; (g) documents identifying the timeframes of all your defensive audits, including when they occurred and how long they lasted; (h) documents containing any formal or informal feedback submitted by you to auditors; and (i) any presentations, decks, or other documents that Music Choice created that reflect the auditors' process or findings.

16. All communications about all Defensive Audits, including (a) communications between you and the auditor(s); (b) internal communications among persons affiliated with Music Choice; and (c) communications between you and any third party.

17. All communications about audits initiated by SoundExchange, including (a) communications between you and the auditor(s); (b) internal communications among persons affiliated with Music Choice; and (c) communications between you and any third party.

18. All direct licenses applicable to any of your service offerings.

19. Any agreements relating to the transmission of sound recordings over the internet between Music Choice and any of its partners pursuant to which anything of value is provided by a partner to Music Choice, or by Music Choice to a partner.

20. All documents that support your position that the Copyright Royalty Judges changed, as opposed to clarified, the audit standards applicable to Music Choice in the *SDARS III* decision, including the Acceptable Procedure Provision, 83 Fed. Reg. 65,210, at 65,262, 65,268.

21. All documents concerning any harm or burden Music Choice contends it has

suffered or may incur as a result of any changes to the Acceptable Procedure Provision.

22. All financial analyses, proposals, presentations, or other documents reflecting your analysis or calculation of royalties you owed to SoundExchange for each of your service offerings, including all documents used to calculate and sufficient to show the amount of royalties you in fact paid to SoundExchange for each of your service offerings.

23. All other documents upon which you intend to rely in this proceeding.

24. All documents considered or relied upon in preparing any portion of any of your written submissions to or testimony given before the Copyright Royalty Judges in this remand proceeding.

Dated: February 1, 2021

Respectfully submitted,

/s/ Emily L. Chapuis
Emily L. Chapuis (D.C. Bar # 1017600)
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Plaintiff SoundExchange, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021 I caused a true and correct copy of the foregoing Requests for Production to be served on all counsel of record via email.

/s/Emily L. Chapuis
Emily L. Chapuis

EXHIBIT B

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR

(2018–2022) (Remand)

**SOUNDEXCHANGE’S FIRST SET OF
INTERROGATORIES TO MUSIC CHOICE**

Pursuant to the Copyright Royalty Judges’ Order Regarding Proceedings on Remand (dated Dec. 1, 2020), 17 U.S.C. § 803(a)(1) and 37 C.F.R. § 351.15, SoundExchange, Inc., *et al.* (collectively, “SoundExchange”) serves this First Set of Interrogatories on Music Choice. These Interrogatories are to be interpreted and answered in accordance with the Definitions and Instructions below.

DEFINITIONS AND INSTRUCTIONS

1. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these document requests.
2. The singular shall be construed to include the plural and the plural shall be construed to include the singular as required by the context to elicit all information discoverable within the broadest scope of these document requests.
3. “And” and “or” have both conjunctive and disjunctive meanings as required by the context to elicit all information discoverable within the broadest scope of these document requests.

4. “Any” and “all” shall mean “each and every.”
5. The term “documents” shall be construed broadly, and includes every writing, recording, photograph, summary, spreadsheet or record in any form, whether handwritten, printed, typed, taped, electronic or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded and includes electronic documents (such as electronic mail messages and all attachments to mail messages).
6. The term “communication” means the transmittal of information by any means and includes communication of any kind, whether written, oral, electronic, or other.
7. The term “including” is illustrative and not limitative and shall be construed to elicit all information discoverable within the broadest scope of these document requests.
8. The terms “reflecting,” “referring,” “concerning,” “relating to,” “related to” and “showing” includes: addressing, pertaining to, referring to, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter.
9. “Acceptable Procedure Provision” refers to any provision of the Copyright Royalty Judges’ regulations identifying “an acceptable verification procedure” for statutory royalties for PSS, including 37 C.F.R. § 382.7(d) published in the CRJ’s Determination at 83 Fed. Reg. 65,268, the provision previously found at 37 C.F.R. § 382.6(e) (2013), and to the extent it may be relevant, the provision previously found at 37 C.F.R. § 382.7(e) (2013).

10. “Audit” refers to any audit or verification procedure related to Music Choice’s statutory royalty obligations or other obligations under the statutory licenses in Sections 114 and 112(e).

11. “CRJ’s Determination” refers to the Final Determination issued by the Copyright Royalty Judges in this proceeding and published in the Federal Register at 83 Fed. Reg. 65,210 (Dec. 19, 2018).

12. “Defensive Audit” refers to an audit or any similar verification procedure initiated by Music Choice in the ordinary course of business that Music Choice contends did or should serve as an acceptable verification procedure in lieu of a verification of Music Choice’s statutory royalty payments and statements of account by an auditor selected by SoundExchange pursuant to audit regulations adopted by the Copyright Royalty Judges.

13. “Distributor” means any multi-channel video programming distributor or other entity that has made Music Choice’s digital audio transmissions available to the public.

14. “Engagement” refers to an arrangement or agreement between you and an auditor regarding the nature of the services to be provided by the auditor in connection with an Audit of Music Choice, including an “audit engagement” or an “agreed-upon procedures engagement” as those terms are used by accountants.

15. “Music Choice,” “you,” and “your” refer to Music Choice, its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, and predecessors of its corporate affiliates, parents, subsidiaries, business units and divisions, and their representatives, officers, agents, servants, counsel, employees, consultants, and any person authorized to act, acting, or purporting to act on their behalf.

16. “Person” means, without limitation, any natural person, group of natural persons, corporation, partnership, company, limited liability company, sole proprietorship, unincorporated association, joint venture, and any other incorporated or unincorporated business, governmental, or public entity.

17. “PSS” refers to a preexisting subscription service or preexisting subscription services, as defined by the Copyright Act, 17 U.S.C. § 114(j)(11).

18. “PSS rate” refers to a royalty rate for PSS under the statutory licenses in Sections 114 and 112(e) of the Copyright Act and its implementing regulations.

19. “SoundExchange” refers to SoundExchange, Inc., and its employees and agents.

20. Please provide separate written responses to each Interrogatory, and repeat the Interrogatory with each response. If you object to any Interrogatory, state the basis for your objection in sufficient detail so as to permit adjudication of the validity of the objection, and respond to the portion of the Interrogatory that you do not find objectionable.

21. Whenever you are instructed to state a date, dollar amount, number, or quantification, if such date, dollar amount, number, or quantification is unknown to you, state your best estimate, indicate that the response is an estimate, and explain why you are unable to provide a more precise response and how you arrived at your estimate.

22. Whenever you identify a specific individual, please indicate: (a) the full name of the individual; (b) the individual’s employer; and (c) the individual’s employment position or title.

23. When the identity or description of a document is requested or referred to in response to an Interrogatory, please indicate: (a) the type of document, such as a letter, memorandum, e-mail message, etc.; (b) the title, if any, of the document; (c) the date of the

document; (d) the identity of the individual who authored the document; (e) the identity of the individuals to whom the document is addressed; and (f) the Bates number(s) of the document (if applicable).

24. Unless otherwise indicated, the Interrogatories below cover the time period from January 1, 1996 through the present.

25. In accordance with the Copyright Royalty Judges' Schedule of Proceedings (dated Dec. 8, 2020) issued in this proceeding, please produce all written responses and objections for delivery no later than March 31, 2021. Please serve one set of all responses and objections by electronic copy to all Jenner & Block attorneys who have appeared in this matter.

26. Each of the following Interrogatories is continuing in nature. If you obtain any additional responsive information at a later date, promptly submit supplemental or amended responses to these Interrogatories.

INTERROGATORIES

1. State how Music Choice is prejudiced by any changes made to the Acceptable Procedure Provision.
2. Identify and describe every instance in which Music Choice has conducted a Defensive Audit. For each Defensive Audit, please describe:
 - a. The dates on which the Defensive Audit commenced and concluded;
 - b. The type of transmissions and period of usage covered, and any exclusions from the scope of the Defensive Audit;
 - c. The identity of the individual auditors and firm(s) and any relationship between Music Choice and the auditor apart from the specific Defensive Audit described;
 - d. The type of Engagement pursuant to which the auditor conducted the Defensive Audit and the procedures followed;
 - e. The findings and whether the auditor provided a written report of any kind.
3. Identify and describe in detail your service offerings that were in existence and making digital audio transmissions to the public over the internet on July 31, 1998. Please state the name of each internet service offering and the Distributor(s) through which subscribers could access the offering on July 31, 1998. For each offering and Distributor, please describe:

- a. The dates the offering was made available to subscribers;
- b. The number of channels of music programming;
- c. How subscribers could access the offering (*e.g.*, on mobile devices, through a distributor's portal, through a Music Choice website, etc.)
- d. The extent to which the offering was available outside the home;
- e. Any subscription or pricing options (*e.g.*, whether the offering was part of a bundle, whether offering was part of a basic or premium tier, any differences in price or content);
- f. Any functionality other than the ability to listen to linear music channels;
- g. The number of subscribers to whom the offering was available on July 31, 1998;
- h. The number of subscribers who actually used the offering in the month of July 1998;

Please note the extent to which the content or features of your offerings described above varied across categories (*e.g.*, bundle, tier of service, method of access).

4. Identify and describe in detail all of your service offerings that have been in existence and making digital audio transmissions to the public over the internet since January 1, 2018, as well as any such offerings that you expect to make through December 31, 2027. For each offering, please provide the information described in Interrogatory No. 3. You may limit your responses to service offerings you claim are eligible for a PSS Rate.
5. Identify and state every piece of evidence that supports your contention some or all of Music Choice's transmissions over the internet during the period 2018-2027 qualify for a PSS Rate.

Dated: February 1, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)

JENNER & BLOCK LLP

1099 New York Avenue NW, Suite 900

Washington, DC 20001

(202) 639-6000

Counsel for Plaintiff SoundExchange, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021 I caused a true and correct copy of the foregoing Interrogatories to be served on all counsel of record by email.

/s/Emily L. Chapuis
Emily L. Chapuis

EXHIBIT C

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**Determination of Royalty Rates and Terms for
Transmission of Sound Recordings by Satellite
Radio and “Preexisting” Subscription Services
(SDARS III)**

**Docket No. 16-CRB-0001-SR/PSSR
(2018-2022) (Remand)**

MUSIC CHOICE’S INTERROGATORIES

Pursuant to this Court’s December 8, 2020 Scheduling Order, Music Choice hereby serves its Interrogatories to SoundExchange, Inc.

DEFINITIONS

1. “SoundExchange,” “you,” “your,” and “yours” means SoundExchange, Inc., and its predecessors, officers, employees, agents, representatives, members, and anyone else acting on its behalf or whose interests are represented by SoundExchange, Inc. in connection with the collection and distribution of royalty payments for the use of sound recordings.

8. “PSS ” means a pre-existing subscription service as that term is defined in 17 U.S.C. § 114(d)(2).

9. “Music Choice PSS” means the subscription audio music service Music Choice offers to residential cable and satellite television subscribers.

10. “Music Choice’s PSS Internet Transmissions” means any portion(s) of Music Choice’s audio program offerings transmitted to its Music Choice PSS subscribers through the internet.

11. The term “Defensive Audit Provision” means 37 C.F.R. 382.87(d) and its predecessor regulatory sections.

12. The terms "concerning," "regarding," “relating to” and their variants mean relating to, referring to, discussing, describing, evidencing, evaluating, constituting, comprising, memorializing, or analyzing.

13. The terms "all," "any," and "each" shall each be construed as encompassing any and all.

14. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Interrogatories all responses that might otherwise be construed to be outside of their scope.

15. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. If, based upon any objection other than a claim of privilege, you refuse to respond to any Interrogatory, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal and the manner and extent to which you will limit your production based upon such objection, including whether you are withholding any otherwise responsive documents. If your objection is only to a portion of the Interrogatory, you must specify which part and the basis for the objection, whether you are withholding any responsive information on the basis of that objection, and produce the rest of the responsive documents.

2. If, in answering these Interrogatories, you claim that any Interrogatory, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual Interrogatory.

3. These Interrogatories and SoundExchange's discovery obligations in responding to these Interrogatories are continuing in nature. To the extent SoundExchange becomes aware of responsive information, or any information becomes responsive after the close of discovery, supplemental Responses to these Interrogatories must be promptly provided to Music Choice at that time.

INTERROGATORIES

1. Identify when and how SoundExchange first became aware of Music Choice's PSS Internet Transmissions.
2. Identify all facts supporting your contention that Music Choice was not making Music Choice's PSS Internet Transmissions prior to 1998, if you so contend.
3. Identify all instances in which SoundExchange has suffered any harm or burden as a result of any PSS Service's use of the Defensive Audit Provision at any time.
4. Identify any and all grounds you contend support your proposed addition of the language "with respect to the information that is within the scope of the audit" to the Defensive Audit Provision.

Dated: February 1, 2021

Respectfully submitted,

/s/ Paul M. Fakler

Paul M. Fakler (NY Bar No. 2940435)

Margaret Wheeler-Frothingham (NY Bar No. 5281191)

MAYER BROWN LLP

1221 Avenue of the Americas

New York, NY 10020-1001

Telephone: (212) 506-2441

Facsimile: (212) 849-5549

PFakler@mayerbrown.com

MWheelerFrothingham@mayerbrown.com

Counsel for Music Choice

Proof of Delivery

I hereby certify that on Monday, May 10, 2021, I provided a true and correct copy of the SoundExchange, Inc.'s Opposition to Music Choice's Motion to Compel the Production of Documents to the following:

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Signed: /s/ Emily Chapuis